No. 00-1854

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MATTHEW J. RYAN, ET AL.,

Petitioners,

v.

DAVID POWELL, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

All Respondents are individuals, governmental bodies, or membership organizations. None of the incorporated membership organizations has a parent company or nonwholly owned subsidiary corporation.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners -- four leaders of the Pennsylvania General Assembly ("Petitioners" or "Legislative Leaders") who voluntarily intervened as defendants and who have participated fully as parties to this action -- seek review of the judgment of the Court of Appeals for the Third Circuit dismissing their interlocutory appeal from a discovery order.

Petitioners cannot demonstrate that the Third Circuit's application of the collateral order doctrine, in finding the District Court's order compelling discovery unreviewable, conflicts with prior decisions of this Court or of other courts of appeals. Petitioners instead argue the merits of their self-styled discovery "privilege" based on legislative immunity from liability. In asking this Court to review the dismissal of

their appeal from a discovery order, Petitioners effectively seek an expansive ruling which would insulate state legislators from discovery even in suits into which they voluntarily intervene and show every intention of actively participating as defendants.

The cavalier argument of these Petitioners -- that they may articulate their views when it suits their purpose, but invoke a discovery shield when it does not -- presents no compelling issue for this Court's review, will have no national significance and is not worthy of this Court's consideration. Petitioners' bid to have the courts of appeals resolve their interlocutory discovery disputes must be declined.

COUNTERSTATEMENT

A. Procedural Background

Plaintiffs filed the underlying action in March 1998, asserting that Pennsylvania's method of funding public education had racially discriminatory effects, known in advance, in Philadelphia and other predominantly minority school districts in violation of the regulations adopted by the United States Department of Education implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d to 2000d-7, *see* 34 C.F.R. §100.3(b), and under 42 U.S.C. §1983. The action was brought by students and parents, organizations, and School District of Philadelphia ("School District") and City of Philadelphia officials initially only against the Governor, Secretary of Education, State Treasurer and Chair of the State Board of Education of Pennsylvania ("Executive Branch Defendants"), and seeks only declaratory and injunctive relief.

In May 1998, Legislative Leaders voluntarily moved to intervene, in order, as they admit, to "give voice to the [General Assembly's] concerns and arguments" and to "articulate to the Court the unique perspective of the legislative branch of the Pennsylvania government." Petition

for a Writ of Certiorari ("Petition") at 5-6, 23. Shortly after their Motion to Intervene was granted, Petitioners filed a Motion for Judgment on the Pleadings or to Dismiss the Complaint, and later filed a Supplemental Motion for Judgment on the Pleadings, both pursuant to Rule 12 of the Federal Rules of Civil Procedure. None of their Rule 12 arguments was premised on legislative immunity.

The District Court granted the Rule 12 motions, dismissing plaintiffs' Complaint on November 18, 1998. On appeal, the Third Circuit reversed and remanded. *Powell v. Ridge*, 189 F.3d 387 (3rd Cir. 1999). [1] In reinstating the Complaint, the Third Circuit rejected various arguments offered in support of the Rule 12 motions on the ground that such points could be tested only upon a developed record, following discovery. *See id.* at 394, 396. The Court specifically contemplated that plaintiffs would seek discovery relevant to their allegations that defendants "had knowledge of such [racially disparate] effects each time prior to taking action which achieved these results." App. 49a-50a; *see Powell,* 189 F.3d at 393 n.1 (anticipating that with discovery the complaint contains allegations which would permit plaintiffs to make a case directly under 42 U.S.C. §2000d).

Accordingly, plaintiffs pursued discovery, including requests for production of documents and interrogatories served upon the four intervenors, by name, seeking basic information relating to formulas for funding public education and changes therein over time, the distribution of federal funds for public education in Pennsylvania, knowledge of the racially discriminatory formulas prior to taking action, and harm to students by virtue of discriminatory funding. (App.

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[1] Petitioners, who had briefed and argued in the Third Circuit, filed a petition for certiorari to this Court, independently of a petition filed by the Executive Branch defendants. This Court denied both petitions. *Ryan v. Powell*, 528 U.S. 1046 (1999); *Ridge v. Powell*, 528 U.S. 1046 (1999).

78a-136a.) Petitioners' initial response was a complete refusal to produce any documents whatsoever and a series of objections on various grounds that provided no information regarding the extent of responsive documents in their possession or under their control. *Id.* After communications among counsel, Petitioners searched their files to determine what documents they had that were responsive to the document requests. (App. 145a-148a.) They ultimately produced only 56 pages of documents, claiming that the remainder of the responsive documents were protected from discovery based upon a blanket "legislative privilege."

Unable to resolve the discovery dispute as to the purportedly privileged information, plaintiffs filed a Motion to Compel. (App. 137a-144a.) The District Court granted the Motion, rejecting Petitioners' arguments concerning their purported legislative privilege and noting that the Third Circuit had "stressed the importance of Plaintiffs' ability to conduct discovery. *See Powell v. Ridge*, 189 F.3d 387, 396-97, 399, 400 (3d Cir. 1999)." (App. 149a.)

Legislative Leaders appealed to the Third Circuit, which entertained letter briefs on the issue of appealability of the District Court's discovery order as well as merits briefs and oral argument. On April 6, 2001, the Third Circuit dismissed the appeal on the basis that the District Court's discovery order was not immediately appealable under the collateral order doctrine. App. 1a-22a, *Powell v. Ridge*, 247 F.3d 520 (3rd Cir. 2001). Legislative Leaders thereupon filed their Petition seeking review by this Court.

B. Facts Underlying Discovery Requests

The School District educates children in grades kindergarten-12, with a student body of nearly 80% African-American, Hispanic, Asian and other minorities. (App. 35a.) Non-white enrollment in public schools in the rest of Pennsylvania as a whole is only approximately 11%. *Id.* The minority students in Philadelphia public schools

comprise nearly 50% of the total minority public school population in Pennsylvania. *Id.*

The Commonwealth funds public education through an annually changing statutory system that depends upon a combination of locally generated revenues authorized by the Commonwealth, state funds and certain federal funds. (App. 45a.) Federal K-12 education funds are appropriated to school districts through Commonwealth legislative and gubernatorial actions. *See Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978).

Plaintiffs allege, and have sought discovery to prove, that the Commonwealth's criteria and methods of funding public education are racially discriminatory with regard to Philadelphia and other predominantly minority school districts. Funding per child is less in the predominantly minority School District than per child in those otherwise similarly situated districts that educate predominantly white students, and racial disparities in per child spending also have increased over time. (App. 45a-50a.) These funding decisions were made each time with knowledge in advance that they were discriminatory and had adversely harmed minority children. (App. 40a-50a.)

REASONS FOR DENYING THE WRIT

Petitioners present no "compelling reasons" for this Court to grant this Petition for a Writ of Certiorari. Supreme Court Rule 10. The ruling below presents a commonplace decision by a court of appeals not to involve itself in discovery disputes in an ongoing district court litigation. Contrary to Petitioners' assertion, this case presents neither a conflict with a decision of this Court or other courts of appeals nor an unsettled question of federal law concerning the well-established principle that appeals from discovery orders are not appealable as collateral orders. Straining to create the illusion of a circuit split, Petitioners treat the issue as one regarding the availability of immunity (rather than

discovery), and in the process base their argument on a fundamental misconception of both the nature of the order being appealed as well as the nature and scope of legislative immunity.

I. THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH THE ACCEPTED RULE THAT DISCOVERY ORDERS ARE NOT APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

A. There Is Nothing About the Third Circuit's Refusal To Involve Itself In Discovery In An Ongoing Case That Warrants This Court's Review

Petitioners contend that this Court should grant certiorari to hear this unremarkable discovery dispute because the Third Circuit's decision allegedly conflicts "with decisions of this Court and all other circuits, including the Third Circuit." Petition at 19. Petitioners are incorrect, because the Third Circuit's decision is entirely consistent with the universally accepted rule that ***discovery orders are not appealable under the collateral order doctrine***. The alleged "conflict" is Petitioners' own creation, which ignores the actual basis of the Third Circuit's decision.

The issue decided by the Court of Appeals was straightforward: whether a district court's discovery order that compels a party to produce documents, and rejects the party's inventive claim of privilege from discovery, is immediately appealable as a collateral order. The Third Circuit held that "the collateral order doctrine does not reach appeals of discovery orders 'beyond the narrow categories of trade secrets and *traditionally recognized privileges*, such as attorney-client and work product.'" App. 6a, *Powell*, 247 F.3d at 524 (citations omitted; emphasis in original). The Third Circuit explained that "[u]nderlying these narrow exceptions to the general rule of non appealability is a concern that where confidential information is sought, there

is no way, absent immediate appeal of the order requiring disclosure, to 'unscramble the egg scrambled by the disclosure.'" App. 7a, *Powell*, 247 F.3d at 524 (citation omitted). No such confidentiality concerns are present here. In fact, Petitioners "explicitly disavow any such [confidentiality] interest." App. 6a-7a, *Powell*, 247 F.3d at 524.

Because the purported privilege invoked by Petitioners "is not even suggested by any reasonable reading of applicable case law," let alone "traditionally recognized," the Third Circuit dismissed Petitioners' interlocutory appeal for lack of jurisdiction. App. 11a-12a, *Powell*, 247 F.3d at 526-27. In reaching its conclusion, the Third Circuit relied heavily upon this Court's opinions in *Cunningham v. Hamilton County*, 527 U.S. 198 (1999), and *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), as well as on its own prior decision in *Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3rd Cir. 2000). These cases apply this Court's decisions concerning the collateral order doctrine, which are based in the seminal case of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

In *Digital Equipment*, for instance, this Court held that an order vacating a dismissal predicated on the parties' settlement agreement did not involve a potential loss of sufficiently "important" rights, and therefore did not satisfy an essential component of the *Cohen* test: that the decision must be effectively unreviewable upon appeal from a final judgment. *Digital Equip.*, 511 U.S. at 865. In *Digital Equipment*, Justice Souter, writing for a unanimous Court, observed that many types of interlocutory orders must remain unappealable despite the fact that review of a final judgment may not provide a perfect remedy to the allegedly aggrieved party:

> [E]rroneous evidentiary rulings, grants or denials of attorney disqualification, and restriction of the rights of

> intervening parties, may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment; and other errors, real enough, will not seem serious enough to warrant reversal at all, when reviewed after a long trial on the merits. In still other cases, an erroneous district court decision will, as a practical matter, sound the "death knell" for many plaintiffs' claims that might have gone forward if prompt error correction had been an option. *But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third Cohen requirement.*

Id. at 872 (citations omitted; emphasis added). *See also Cunningham*, 527 U.S. at 202-10 (order imposing sanctions on party's attorney for discovery abuse not immediately appealable as collateral order); [2] *United States v. Ryan*, 402 U.S. 530, 532 (1971) (subpoenaed party may not appeal denial of motion to quash subpoena, but must either obey or refuse to do so and appeal if subsequently cited for contempt).

In its decision below, the Third Circuit also stressed that its dismissal of Petitioners' appeal was consistent with "the approach taken by the other courts of appeals." App. 6a, *Powell*, 247 F.3d at 524. Indeed, contrary to Petitioners' claim here that the Third Circuit stands alone, courts of appeals repeatedly have held that the collateral order doctrine does *not* apply to permit an immediate appeal from orders

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[2] In *Bacher*, the Third Circuit found *Cunningham* instructive because "the Court's statement in *Cunningham* that we should not apply the collateral order doctrine on a 'case-by-case' basis indicates that we should not attempt to carve out case-by-case exceptions to the general rule that discovery orders are not immediately appealable." 211 F.3d at 57.

compelling the production of documents, or from similar discovery orders. *See F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 458 & n. 2 (1st Cir. 2000); *In re United States v. Peck*, 680 F.2d 9, 11 (2nd Cir. 1982); *A-Mark Auction Galleries, Inc. v. American Numismatic Ass'n*, 233 F.3d 895, 899 (5th Cir. 2000); *Coleman v. American Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992); *Simmons v. City of Racine, PFC (Police and Fire Comm'n)*, 37 F.3d 325, 327 (7th Cir. 1994); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953 (8th Cir. 1979); *Marchetti v. Bitterolf*, 968 F.2d 963, 967 (9th Cir. 1992); *Boughton v. Cotter*, 10 F.3d 746, 749-50 (10th Cir. 1993); *In re Kessler*, 109 F.3d 1015, 1016 (D.C. Cir. 1996); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991).

The rule that discovery orders are not immediately appealable as collateral orders "is true even of discovery orders issued over an objection that the information at issue is privileged," *Simmons, supra,* 37 F.3d at 327 (collecting cases), and *even where the privilege asserted is that of governmental immunity. Peck, supra,* 680 F.2d at 9 (refusing to make exception to general rule in case where United States Attorney General objected to discovery request under claim of executive privilege). Indeed, if there is any "conflict" between the Third Circuit and its sister courts of appeals, it is that the Third Circuit is generally more willing to consider interlocutory appeals of discovery orders, since other courts of appeals do not apply the collateral order doctrine to permit appeals of discovery orders where trade secrets or "traditionally recognized" privileges are involved. *See Bacher*, 211 F.3d at 54; *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997) ("[A] discovery order is not deemed collateral even if it is an order denying a claim of privilege. We so held emphatically in [two prior cases] and this is the view of other circuits as well, with the partial exception of the Third Circuit") (citations omitted).

Having no rebuttal for the well-settled tenet that discovery orders are not immediately appealable as collateral orders, Petitioners do not attempt to dispute it. Instead, they ignore the basis for the Third Circuit's decision as well as the authorities the Court found persuasive, or relegate such authorities to footnotes and string cites. The Third Circuit's decision is entirely consistent with the case law of this Court and every court of appeals that has decided the issue.[3] Petitioners attempt to escape the mountain of adverse precedent -- and conjure up a "conflict" of authority -- by citing a series of inapposite decisions that deal with governmental immunity as *a defense, not to discovery, but to liability*.[4] The cases relied upon by Petitioners do not involve discovery orders. Rather, each case cited by Petitioners concerns an attempt to escape potential liability

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[3] Petitioners also contend that the Third Circuit's decision is inconsistent with its own prior decisions, Petition at 19-22, which surely is no basis for this Court to exercise its discretionary jurisdiction. In advancing this argument, the Petition fails to discuss *Bacher*, the case that the Third Circuit found to be dispositive. Indeed, the Petition's only reference to *Bacher* is found in a string cite in footnote 11 (in which its holding is misstated).

[4] The Third Circuit carefully considered the protections afforded to legislators by virtue of absolute legislative immunity and recognized the appealability of orders denying such immunity claims on the merits. *See* App. 7a, *Powell*, 247 F.3d at 524, citing cases. While legislators under other circumstances may be entitled to immunity, their invocation of immunity for the sole purpose of insulating themselves from discovery, in a case which they willingly joined, while otherwise remaining active litigants, is hardly commonplace. "A proper invocation of legislative immunity would typically call for the dismissal of a legislator from a lawsuit." App. 9a, *Powell*, 247 F.3d at 525. *See also* App. 10a, *Powell*, 247 F.3d at 526 (dismissal is the "logical" and "appropriate result where legislative immunity applies" and "best furthers the underlying goals of the doctrine").

under a claim of governmental immunity. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985) (former Attorney General claimed absolute or qualified immunity from damages in civil lawsuit); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (former President claimed absolute immunity in civil action for money damages); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (congressman claimed indictment violated Speech or Debate Clause of United States Constitution). [5]

Simply put, the decisions cited by Petitioners -- almost all of which involve orders denying motions to dismiss or for summary judgment -- have no relevance to the appealability of the District Court's discovery order in this case. As the Court explained in *Lauro Lines, S.L.R. v. Chasser*, 490 U.S. 495 (1989): "after *Mitchell*, [t]he critical question ... is whether 'the essence' of the claimed right is a right not to stand trial." *Id.* at 500 (brackets and ellipses in original) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524

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[5] Likewise, the cases cited in footnote 12 of the Petition all involve the appealability of an order rejecting an immunity defense *on the merits*. *See Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984) (order denying motion to dismiss); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70 (2nd Cir. 1992) (same); *Bines v. Kulaylat*, 215 F.3d 381 (3rd Cir. 2000) (order denying summary judgment); *Front Royal & Warren County Indus. Park v. Town of Front Royal*, 865 F.2d 77 (4th Cir. 1989) (order striking absolute immunity defense); *Liberty Mutual Ins. Co. v. Louisiana Dept. of Ins.*, 62 F.3d 115 (5th Cir. 1995) (order appealable where it implicitly rejected defendant's qualified immunity defense); *Prince v. Hicks*, 198 F.3d 607 (6th Cir. 1999) (order denying motion to dismiss); *Auriemma v. Montgomery*, 860 F.3d 273 (7th Cir. 1988) (same); *Brown v. Griesenauer*, 970 F.2d 431 (8th Cir. 1992) (same); *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996) (order denying motion for summary judgment); *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) (order denying motion to dismiss and for partial summary judgment); *Ellis v. Coffee County Bd. of Registrars*, 981 F.2d 1185 (11th Cir. 1993) (order denying summary judgment).

(1988)). Here, Petitioners claim a right to participate actively as parties in the trial and other aspects of the case, but only when it serves their purposes to do so. The Third Circuit properly rejected this argument, and distinguished many of the cases cited by Petitioners:

> Despite their understanding of legislative immunity's broad parameters, however, Legislative Leaders are not seeking immunity from this suit which, it must be remembered, they voluntarily joined. Nor are the Legislative Leaders seeking any kind of wholesale protection from the burden of defending themselves. Instead, the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation by submitting briefs, motions and discovery requests of their own, yet allow them to refuse to comply with and, most likely, appeal from every adverse order.... [T]he privilege they propose would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined.

App. 8a, *Powell,* 247 F.3d at 525.

No authority recognizes a privilege that would permit state officials voluntarily to participate in litigation under such lopsided terms. The Third Circuit followed the standard course followed by the federal courts in dismissing Petitioners' interlocutory appeal of a district court's discovery order.

B. There Is No Applicable Privilege From Discovery For These State Legislators

While this Court need not even consider the existence, or more precisely the nonexistence, of the "privilege" Petitioners assert here, even if the Third Circuit's majority decision is construed as turning on the merits of Petitioners' assertion of privilege, rather than on the appealability of a

discovery order, there is no viable ground for recognizing such a privilege, particularly in the context of this case.

Petitioners posit that this is a case of "great national importance" that could have widespread consequences for the "accomplishment of legislative duties." Petition at 12. Yet, they have failed to identify any other case in which a governmental entity or official sought to intervene in litigation while at the same time shielding itself from all discovery. Instead, Petitioners wrongly equate the concepts of immunity from discovery with immunity from liability and rely on an inapposite line of cases from *Tenney v. Brandhove*, 341 U.S. 367 (1951), through *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), which address legislative immunity from liability, not from discovery.

In *Tenney*, this Court discussed and found applicable only immunity from liability, not immunity from discovery. *See also Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. 719, 732 (1980) ("state legislators enjoy common law immunity *from liability* for their legislative acts"; not considering immunity from discovery) (italics added). *Tenney* itself recognized the distinction between legislators who are sued as defendants and those, like Petitioners, who affirmatively involve themselves in court proceedings. 341 U.S. at 378 ("[T]his is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege.") (emphasis added). Petitioners similarly stretch *Bogan* beyond its actual meaning. *Bogan* does not hold that legislators are immune from discovery in civil suits; *Bogan* is devoid of discussion of discovery issues. Rather, the issue there was whether immunity from liability under §1983 extends to local legislators. The Court's analysis focused on the reasons for immunity from liability for legislative activity itself.

Petitioners also attempt to rely on cases providing immunity from discovery to members of the federal Congress pursuant to the Speech or Debate Clause in the Constitution of the United States. Art. I, §6. Speech or Debate Clause protections, however, do not apply here, where a federal court is applying a federal statute to state legislators. As the Third Circuit commented in *Lunderstadt v. Colafella*, 885 F.2d 66, 73 (3rd Cir. 1989), which involved state legislators, "[t]he Speech or Debate Clause of the United States Constitution is *by its terms* applicable *only* to members of the United States Senate and House of Representatives." (Emphasis added.) Similarly, in *Government of Virgin Islands v. Lee*, 775 F.2d 514, 519 (3rd Cir. 1985), the Court stated that the "Speech or Debate Clause of the United States Constitution ... is the legislative immunity provision for our *national* representatives." (Emphasis added.) *See also* authority relied upon by Petitioners: *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975) (suit against United States Senate subcommittee members regarding propriety of subcommittee investigation and issuance of federal subpoenas); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (United States Senate subcommittee members sued); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 857 (D.C. Cir. 1988) ("[t]his case presents questions of congressional immunity under the Constitution's Speech or Debate Clause"). [6]

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[6] Any hint by Petitioners that the law of the Third Circuit -- in declining to extend the full reach of the federal Speech or Debate Clause to state legislators -- may be different than other circuits, thus justifying a Writ in this case, is of no moment. For example, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995), upon which Petitioners rely, explicitly recognized that its decision "[was] limited to discussing Congress' Speech or Debate Clause privilege." *Id.* at 423. The lone case Petitioners cite suggesting (in the context of a decision determining whether summary judgment was properly granted) that legislative immunity provides a privilege from discovery for

Petitioners quote *United States v. Helstoski*, 442 U.S. 477, 491 (1979), for the separation of powers proposition that "[l]egislative immunity is intended 'to preserve the constitutional structure of separate, coequal, and independent branches of government.'" Petition at 14. They overlook, however, that the separation of powers concerns underpinning the Speech or Debate Clause for members of Congress are not implicated in this case, since state officials are not part of a coequal branch of the federal government. *See United States v. Gillock*, 445 U.S. 360, 370 (1980) ("under our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators"); and *In re Grand Jury*, 821 F.2d 946, 954 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1025 (1988) ("The interest in preventing intrusion, [*Gillock*] held, provides no support for a privilege for state legislators in federal cases because the Federal Government has supremacy over state legislatures in areas where the Constitution grants it power to act.... 'federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch'") (quoting *Gillock*, 445 U.S. at 370). *See also Virgin Islands*, 775 F.2d at 520 ("the *central* role of such immunity is 'to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary'") (*quoting Gravel v. United States*, 408 U.S. 606, 617 (1972)) (emphasis added). No such concern applies here.

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state legislators states that this "privilege may be waived." *See Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996). *See also* App. 8a, *Powell*, 247 F.3d at 525 (*Burtnick* is "in direct contrast to this case," since target sought "to extricate himself ... *completely* from legal entanglements").

II. THE "DANGER" PETITIONERS FORETELL IS ILLUSORY AND FAILS TO JUSTIFY THE EXERCISE BY THIS COURT OF ITS DISCRETIONARY REVIEW

A. The Third Circuit's Ruling Will Not Have The Far Reaching Impact Petitioners Contend

Petitioners claim that if the Third Circuit's decision to dismiss their appeal is allowed to stand, state legislators nationwide -- as well as legislators in United States territories -- will be subject to untold harm and disruption. This claim ignores the nature and scope of the decision of which Petitioners seek review. As the Third Circuit made clear when it dismissed Petitioners' appeal, it lacked jurisdiction and therefore did not reach the merits. A decision that the courts of appeals will not entertain a stream of discovery disputes from four legislators [7] who voluntarily joined the case can hardly be said to hamper the ability of all state and territorial legislators to carry out their legislative activities. [8]

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[7] The discovery at issue was directed only to the four Legislative Leaders who voluntarily intervened in this action. There is no issue presented concerning the other, more than 250, Pennsylvania legislators.

[8] Petitioners urge that allowing the courts of appeals not to review discovery orders somehow will result in courts prescribing educational funding formulas. Petition at 12. Their citation to *Campaign for Fiscal Equity v. New York*, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001), is entirely misplaced. That decision was on the merits, after trial, and had nothing to do with discovery and legislative privilege. Even if *Campaign for Fiscal Equity* were somehow relevant to the issue here, Petitioners mischaracterize the scope of the state court's order in that case. The court did not dictate the manner in which the educational funding formula -- which was determined to violate the New York Constitution as well as Title VI regulations -- had to be revised. Rather, the Court left it to the legislature "in the first instance, [to] take steps to reform the current system." 719 N.Y.S.2d at 549.

B. Petitioners Created The Situation They Face

Even if the sweeping privilege from discovery these four state legislators seek in this federal statutory case were arguably available, this would not be an appropriate case for this Court to consider the application of such a privilege. In this case, a handful of state legislators have voluntarily intervened, participated fully, and then claimed that they are completely insulated from providing any discovery on the basis of some hybrid immunity born from their desire to avoid the "distraction and burdens" of being embroiled in the litigation process into which they invited themselves. Petitioners "chose to participate." Petition at 27.

Since intervening, Petitioners' proactive approach has been to involve themselves completely in every phase of litigation, including serving discovery on plaintiffs. Petitioners' own conduct, therefore, is in stark contrast to legislators who have been sued and have from the outset attempted to disentangle themselves from litigation. *See* App. 8a-9a, *Powell*, 247 F.3d at 525 (Petitioners "have failed to come up with even one case which hints at the existence of the privilege they press. Every case Petitioners cite to support their alleged privilege features, in direct contrast to this case, a defendant or a target of a subpoena seeking to extricate himself or herself *completely* from various legal entanglements"). As the Third Circuit observed from Petitioners' briefs and oral argument:

> Unlike the reluctant participants in the cases upon which they rely, the Legislative Leaders voluntarily installed themselves as defendants. And, unlike the reluctant participants in those cases, the Leaders wish to remain as defendants and participate as long as this case is around; at no time, we note, have they invoked legislative immunity as a basis for any of their various motions to dismiss. This is simply not a case of legislators caught up in litigation in which they do not wish to be involved. Rather, these are self-made defendants who seek to turn

> what has heretofore been the shield of legislative immunity into a sword.

App. 9a, *Powell*, 247 F.3d at 525. Petitioners wish to be heard (Petition at 5-6, 23; and App. 3a, *Powell*, 247 F.3d at 522 [Legislative Leaders seek to "give voice" and "articulate ... the[ir] unique perspective"]) on their terms, but refuse to disclose in discovery what they will say, and have said, on the issues raised in this case. Their unprecedented effort should not be aided by the Court.

C. Petitioners' Anti-Waiver Argument Is Not Before The Court

Petitioners' claim that the Third Circuit construed their intervention as a waiver of some privilege is unavailing. Petition at 22-23 and n. 13. The Third Circuit did "*not* decide ... whether the very act of intervening has waived the privilege." App. 11a, *Powell*, 247 F.3d at 527 n. 4 (emphasis added). A concurring opinion expressed a view on the subject of waiver, but that was not part of the majority's holding. *See* App. 20a-21a, *Powell*, 247 F.3d at 531 (Roth, J. concurring) (rejecting Petitioners' suggestion that by "intervening [they] did not waive their privilege because any such waiver was not sufficiently explicit," remarking that "I cannot conceive ... of a more explicit waiver of immunity than willingly submitting oneself to the jurisdiction of a federal district court"). In any event, contrary to Petitioners' representation that they "explicitly reserved the right to assert the privilege at issue here" when they intervened (Petition at 6), at that time the "then-proposed intervenors referred to immunity only in passing when they stated, in a footnote in their brief, that they do not waive any 'speech or debate immunity' they may have." App. 4a n. 1, *Powell,* 247 F.3d at 522-23 n. 1. Petitioners' intervention papers were devoid of any reference to any legislative privilege against discovery.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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